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SHORT FORM ORDER

INDEX NO. 11-35988

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 45 - SUFFOLK COUNTY

COPY

PRESENT:
Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 11-14-13
ADJ. DATE: 12-20-13
Mot Seq. 007-MG
008-MotD
Conference: 4/4/14 - Cancelled
Conference for trial schedule: 4/18/14
CDISP - No

LAURA PRINCE-VOMVOS,

Plaintiff,

-against-

WINKLER REAL ESTATE, INC., and
JAMIE WINKLER,

Defendants.

COSTANTINO & COSTANTINO
Attorneys for Plaintiff
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Copiague, NY 11726

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290 Broadhollow Road, Ste 305
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Upon the following papers numbered 1-153 read on the motions for partial summary judgment and summary judgment ; Notice of Motion and supporting papers 1-15; 74-113 ; Notice of Cross Motion and supporting papers___; Answering Affidavits and supporting papers 16-46; 114-147 ; Replying Affidavits and supporting papers 47-71; 148-153 ; it is,

ORDERED that the short form order dated March 25, 2014 is vacated and the limited oral argument scheduled for **April 4, 2014** is cancelled; and it is further

ORDERED that the motion (007) by the plaintiff for partial summary judgment is granted; and it is further

ORDERED that the motion (008) by the defendants for summary judgment is granted to the extent that the second, third, fourth, and fifth causes of action are dismissed; and it is further

ORDERED that the belated Affirmation in Further Support of Defendants' Motion for Summary Judgment, dated March 21, 2014, is rejected and is not considered as part of the record of these motions; and it is further

ORDERED that the parties are directed to appear in Part 45 on **April 18, 2014**, at 9:30 am at the courthouse located at 1 Court Street - Annex, Riverhead, New York, for a trial scheduling conference, including the remaining counterclaims and reasonable attorney's fees pursuant to Paragraph 7.02 of the Employment Agreement.

The plaintiff commenced this action to recover money damages incurred by reason of the defendants' alleged wrongful conduct in breaching the plaintiff's written employment contract with the corporate defendant and recovery of damages in tort by reason of the individual defendant's tortious interference with the plaintiff's contractual relations with the corporate defendant.

The record reveals that the plaintiff accepted employment with the defendants as manager of the Islip real estate office on June 25, 2008, and executed an employment agreement ("the Agreement"). The Agreement provided that the plaintiff would begin work on September 1, 2008, and would continue her employment for an undetermined period of time. The plaintiff would be paid $60,000 per year. The Agreement also provided for a salary override of net profits at the end of each year and additional commissions in addition to the base salary. The plaintiff agreed not to disclose confidential information and not to engage in activities which may conflict with the employer's interests. The Agreement provided for voluntary termination and termination for cause in Article 8.

Paragraph 8.01, Voluntary Termination by Employer, provides, in part:

> Employment under this Agreement may be terminated by Employer in the event that, under the management of Employee, the Winkler Real Estate-Islip office does not earn a minimum of $400,000 gross commissions per annum by the end of year 2. If the Employee is terminated for failure to meet the minimum performance standards as set forth above and the Winkler Real Estate-Islip office is closed/sold, the Employee shall not be entitled to receive any severance pay. In the event of any other voluntary termination of Employee by Employer, the Employee shall be entitled to a severance pay equal to $60,000 per annum for a period of two years from the date of termination. * * *

Paragraph 8.02, Termination by Employer for Cause, provides, in part:

> Employer may terminate the employment of Employee for cause by written notice to Employee *stating the specifics of the cause of termination.* The causes for termination include: a conviction of a felony, any act involving moral turpitude, or a misdemeanor where imprisonment is imposed; commission of any act of theft, fraud, dishonesty or falsification of any employment or business records of Employer or any of its affiliates; misconduct, including misappropriation of funds or property of Employer or any of its affiliates, or securing or attempting to secure personally profit in connection with any transaction entered into on behalf of Employer;

> any violation of law or regulations to which Employer or any of its affiliates is subject, destruction of any property belonging to Employer, * * * willful actions that Employee knows or should know may have a serious detrimental effect on the business or reputation of Employer, * * * . For purposes hereof, termination for cause shall not include any act or failure to act on Employee's part if done or omitted to be done by her in demonstrable good faith and with the reasonable belief that her act or omission was in the best interest of Employer or any of its affiliates or pursuant to an express policy of Employer at the time of such act or omission. In the event Employer wishes to investigate any alleged misconduct, Employer may, after discussing the proposal of suspension with Employee and considering Employee's views, suspend Employee on pay while the investigation is carried out. No severance pay shall be due to Employee for a termination as set forth in this article. (emphasis added).

Paragraph 8.03, Obligations of Employee upon Termination, provides, in part, that upon termination of the Employee's employment for any reason, the Employee shall immediately return all information, material or property including computers, computer disks, printouts, manuals, reports, letters, security cards, and keys, which are in the Employee's possession.

The plaintiff allegedly performed her duties to the defendants' satisfaction during the first two years of her employment. The record reveals that on or about September 16, 2011, the defendants informed the plaintiff that due to monetary reasons, it would be necessary to reduce the plaintiff's salary in half, which began on October 3, 2011. The plaintiff allegedly cashed the paychecks under protest and informed the defendants that they had violated the Agreement. On November 3, 2011, the defendants provided the plaintiff with a paycheck constituting the difference between the agreed-upon salary and the underpayment. By letter dated November 4, 2011, the plaintiff received written notice that she was being terminated for cause. The letter revealed the defendants' belief that the plaintiff committed an act involving moral turpitude, fraud, dishonesty, and falsification related to her application for an FHA loan for her personal home purchase. The plaintiff applied for unemployment benefits soon thereafter, which was initially approved by the Department of Labor, effective November 14, 2011. The defendants objected and requested a hearing, seeking a disqualification of benefits due to misconduct, pursuant to New York Labor Law § 593(3).[1] As a result of a hearing held before the Unemployment Insurance Appeal Board ("Appeal Board"), a determination dated September 17, 2013 (Hodges, ALJ) was issued.[2]

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[1] Labor Law § 593 (3) provides that a claimant is disqualified from receiving benefits after having lost employment through misconduct in connection with that employment.

[2] The ALJ determined that the record lacked substantial evidence that the claimant engaged in fraud, or that she knew or should have known that her actions were jeopardizing her job. The ALJ

This action was commenced by filing on November 21, 2011. The complaint contains five causes of action: breach of the employment agreement; violation of New York Labor Law §§§ 190, 198-c, and 198(1-a); unjust enrichment; intentional interference by the defendant Jamie Winkler ("Winkler") with contractual relations between the corporate defendant and the plaintiff; and false statements and malicious intent by the defendants to interfere with the plaintiff's interests. In their answer, the defendants assert a general denial and four counterclaims: conversion and misappropriation of a computer and a file for 34 Wavecrest Avenue, West Islip; replevin; injunction; and attorney fees.

The plaintiff now moves for partial summary judgment in her favor on the issue of wrongful termination. The defendants move for summary judgment dismissing the complaint.

In support of her motion, the plaintiff claims that the defendants should be collaterally estopped from raising issues concerning her alleged misconduct based upon a favorable ruling by the Appeal Board dated September 17, 2013 (Hodges, ALJ),[3] which denied the defendants' objections and provided the plaintiff with unemployment benefits. The plaintiff contends that the issues related to her conduct were fully litigated before the Appeal Board, and claims that the Appeal Board clearly found that the plaintiff was wrongfully terminated. The plaintiff submits, among other things, the pleadings, a copy of the Agreement, her personal affidavit, Winkler's deposition testimony, and a copy of the Appeal Board determination.

The plaintiff avers in her affidavit that she was a loyal employee of Winkler Real Estate, Inc., and believed that there were never any problems with her employment nor was she ever made aware of any problems or misconduct. The plaintiff was under the impression that her employment would be terminated due to Winkler's financial hardship which might require closing the office. In September, 2011, the plaintiff was informed by Winkler that her salary would be reduced as a financial measure, not because of any misconduct on the plaintiff's part. After receiving her reduced paychecks, she negotiated the checks under a reservation of rights and informed the defendants that they violated the Agreement. The plaintiff states that she was immediately terminated on November 4, 2011. The plaintiff states that although the termination letter alleges that she was a borrower on

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concluded that the claimant's actions did not constitute misconduct under the Unemployment Insurance Law, and that the claimant's employment ended under non-disqualifying conditions.

[3] The Appeal Board found that, after testimony by the parties, that the credible evidence established that the plaintiff's home was placed on the market and she purchased a new home. The explanations provided by the parties as to the steps taken in connection with these transactions were both alleged and speculative. The record lacked substantial evidence that the plaintiff engaged in fraud. The Appeal Board noted that the employer had suspicions for months that were not shared with the claimant and further it was also significant that there were concurrent issues regarding pay. The Appeal Board concluded that the plaintiff's actions did not constitute misconduct under the Unemployment Insurance Law and that the plaintiff's employment ended under non-disqualifying conditions.

the promissory note that was subject to the short sale at 10 Manistee Lane, only her estranged husband was the borrower.

Winkler testified that the plaintiff complied with the Agreement from 2008 through 2010, and had facilitated the gross commissions of $400,000 per year. In March of 2011, she learned that a lis pendens was filed on the plaintiff's residence located at 10 Manistee Lane, East Islip. The plaintiff placed the house on the market to sell in a short sale. A private listing was given to the defendant, Winkler Real Estate. Although the plaintiff managed the listing, non-party Jodi LaSalla, who was the office administrative assistant and also a real estate agent, was named as the listing agent, the purchaser's agent and the seller's agent. The purchaser of the Manistee Lane house was non-party Alison Rotella, also a real estate agent in the Winkler firm. On May 23, 2011, Winkler was informed by non-party Michael Giardina, a loan officer at Bank of America that the plaintiff was attempting to create a false separation agreement to increase her income so that she would qualify for a mortgage, and was eventually denied the mortgage. On July 27, 2011, Winkler contacted Mr. Giardina and informed him that the plaintiff had closed on her new home located at 34 Wavecrest Avenue, West Islip, and had obtained a mortgage. Mr. Giardina expressed surprise, since the plaintiff had sold her prior residence in a short sale and would not have been eligible for a mortgage within three years of selling. Winkler testified that she did not confront the plaintiff with this information on either date. Upon the sale of the house at Manistee Lane on October 11, 2011, Winkler obtained a commission, the plaintiff obtained a commission, and Allison Rotella received a referral fee. Winkler investigated the matter and spoke to Mr. Giardina again, who advised her that the plaintiff's act of obtaining a mortgage after selling her home in a short sale would adversely affect Winkler Real Estate's reputation. Winkler ordered a title search on both properties and learned that the plaintiff had changed the deed to remove herself from the deed in June, 2011 prior to purchasing the premises at 34 Wavecrest Avenue.

Winkler further testified that her company was undergoing financial difficulties sometime in 2010 and 2011. She stated that she informed the plaintiff that the income at the office in Islip was not sufficient to pay the bills. Winkler vaguely recalled discussing closing or selling the Islip office. She had discussed cost cutting methods with an accountant, began to trim the company's expenses, and was borrowing from her pension fund to pay expenses. Then she reduced the plaintiff's salary in October, 2011. She consulted an attorney and learned that reducing the plaintiff's salary was in violation of the Agreement. She also learned that a home purchaser cannot obtain an FHA mortgage within three years of a short sale. Throughout this time, Winkler stated that she had not informed the plaintiff of this information, and had not taken away any of the plaintiff's responsibilities. By letter dated November 4, 2011, Winkler terminated the plaintiff for cause. Winkler stated that she contacted the Suffolk County District Attorney's office, who brought criminal charges against the plaintiff.

In opposition, the defendants contend that they should not be collaterally estopped inasmuch as the case law the plaintiff cites was abrogated by statute. New York Labor Law § 623(b) provides that no finding of fact or law contained in a decision rendered pursuant to this article by a referee,

the appeal board, or a court shall preclude litigation of any issue of fact or law in any subsequent action or proceeding.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y. Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

In order to invoke the doctrine of collateral estoppel, (I) the identical issue must have necessarily been decided in the prior action and be decisive of the present action and (ii) the party to be precluded from re-litigating the issue must have had a full and fair opportunity to contest the prior determination (***Kaufman v Eli Lilly and Co.***, 65 NY2d 449, 455, 492 NYS2d 584 [1985]). "The quasi-judicial determinations of administrative agencies are entitled to collateral estoppel effect where the issue a party seeks to preclude in a subsequent civil action is identical to a material issue that was necessarily decided by the administrative tribunal and where there was a full and fair opportunity to litigate before that tribunal" (***Auqui v Seven Thirty One Ltd. Partnership***, 22 NY3d 246, 980 NYS2d 345 [2013], *quoting* ***Jeffreys v Griffin***, 1 NY3d 34, 39, 769 NYS2d 184 [2003]). The party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination, whereas the party attempting to defeat the application of the doctrine of collateral estoppel bears the burden of demonstrating the absence of a full and fair opportunity to litigate the issue in the prior action (***Kaufman v Eli Lilly and Co.***, 65 NY2d at 456, *supra*; ***Failla v Nationwide Ins. Co.***, 267 AD2d 860, 862, 701 NYS2d 161 [3d Dept 1999]).

New York Labor Law § 623(1) provides:

> A decision of a referee, if not appealed from, shall be final on all questions of fact and law. A decision of the appeal board shall be final on all questions of fact and, unless appealed from, shall be final on all questions of law.

Here, the plaintiff has demonstrated that the factual issue of whether she was discharged for cause, as decided in the unemployment proceeding, was identical to that presented in the instant civil action. In addition, the plaintiff avers that the issue of misconduct was fully litigated at the hearing

conducted by the Appeal Board, and, as provided by Labor Law § 623(1), the defendants should be collaterally estopped from relitigating the issue.

In opposition, the defendants contend that they should not be collaterally estopped inasmuch as the case law[4] the plaintiff cites was abrogated by New York Labor Law § 623(2), which provides:

> No finding of fact or law contained in a decision rendered pursuant to this article by a referee, the appeal board, or a court shall preclude litigation of any issue of fact or law in any subsequent action or proceeding, except in the cases of causes of action which arise under the Unemployment Insurance Law, which seek to collect or challenge liability for unemployment insurance contributions, which seek to recover overpayments of unemployment insurance benefits, or which allege that a claimant or employer was denied constitutional rights in connection with the administrative processing, hearing, determination or decision of a claim for benefits or assessment of liability for unemployment insurance contributions.

The defendants, instead of submitting the complete legislative bill jacket, submit an uncertified, hearsay letter dated July 7, 1987, encouraging the enactment of A.7319 (which later became Labor Law § 263[2]), and explaining that the bill is in response to the decision in ***Ryan v New York Telephone Co.***, 62 NY2d 494, 478 NYS2d 823 (1984). The letter states that hearing officers would be relieved of investigating issues which are remotely related to the issue of benefit eligibility. The letter further states that by eliminating the collateral estoppel effect of unemployment insurance decisions, the bill will again streamline unemployment insurance proceedings to the benefit of both employers and employees.

The Second Department, in ***Dailey v Tofel, Berelson, Saxl & Partners***, 273 AD2d 341, 710 NYS2d 95 (2d Dept 2000), has continued to abide by the holding in ***Ryan v New York Telephone Company***, *supra*. Contrary to defendants' contention, the holding did involve an unemployment insurance decision (*see* Appellate Briefs, 2000 WL 35304281, 2000 WL 35304282). Moreover,

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[4] In ***Ryan v New York Telephone***, 62 NY2d 494, 478 NYS2d 823 (1984), the plaintiff was discharged for stealing equipment from his employer. He was denied unemployment benefits. He was arrested and the charges were later dismissed in the interest of justice. In a subsequent civil action, the plaintiff sued his former employer for false arrest, malicious prosecution, slander and wrongful discharge. The employer asserted the affirmative defense of collateral estoppel. The trial court granted plaintiff's motion to strike the defense and the appellate division affirmed. Although the claimant's criminal charges had not been dismissed prior to the determination by the ALJ, and the claimant he did not have a full and fair opportunity to litigate his allegations of false arrest, the Court of Appeals reversed on the ground that the doctrine of collateral estoppel precluded the action, since the plaintiff had a full and fair opportunity to a hearing by the Administrative Law Judge.

various lower court cases have held that collateral estoppel effect is available for decisions centered on unemployment insurance benefits issues (*see* ***Marlin Mech. Servs., Inc. v Hopkins***, 2012 WL 3070823 [Sup Ct, New York County 2012]; ***Kornichuk v Transport Workers Union Local 252***, 2011 WL 5059088 [Sup Ct Nassau County 2011]).

However, various First Department cases have held that Appeal Board findings lack preclusive effect in a subsequent action or proceeding (*see* ***Silberzweig v Doherty***, 76 AD3d 915, 908 NYS2d 39 [1st Dept 2010]; ***Matter of Strong v New York City Dept. of Educ.***, 62 AD3d 592, 880 NYS2d 39 [1st Dept 2009]; ***Wooten v New York City Dept. of Gen. Servs***. 207 AD2d 754, 617 NYS2d 3 [1st Dept 1994]; *see also* ***Payton v City Univ. of New York***, 453 FSupp2d 775, 787 [SDNY 2006]).

Upon close examination of the Second Department and lower case authorities, it appears that the effect of the enactment of Labor Law § 623(2) was never raised or addressed. It does appear that the general rule expressed in ***Auqui v Seven Thirty One Ltd. Partnership***, 22 NY3d 246, *supra*, that the determinations of administrative agencies are entitled to collateral estoppel effect where there is an identity of issue between the prior administrative proceeding and the subsequent litigation, must give way to the exclusion carved out by the Legislature as set forth in § 623(2) (*see* 13A NY Prac, Employment Law in New York § 7:420; ***Matter of Engel v Calgon Corp.***, 69 NY2d 753, 512 NYS2d 801 [1987], *affirming* 114 AD2d 108, 498 NYS2d 877 [3d Dept 1986]; *compare* ***Ridge v Gold***, 2014 WL 1099714 [4th Dept 2014]). The court is guided by the canons of statutory construction, and "in construing legislative enactments our role is not to determine the wisdom or propriety of any particular statute, or to correct supposed errors, omissions or defects, but simply and foremost to ascertain and give effect to the intent of the Legislature and to avoid construing any statute in such a way as to render it ineffective" (***National Org. for Women v Metropolitan Life Ins. Co.***, 131 AD2d 356, 516 NYS2d 934 [3d Dept 1987]). A construction which tends to render a statute ineffective is to be avoided (*see* McKinney's Cons. Laws of NY, Book 1, Statutes §144; ***Matter of Wilson v Board of Educ.***, 39 AD2d 965, 333 NYS2d 868 [2d Dept 1972], *mod* 32 NY2d 636, 342 NYS2d 659 [1973]). Therefore, the Appeal Board findings lack preclusive effect in this action.

However, the inquiry does not end there. Here, upon an examination of the entire record, the plaintiff has met her burden of establishing her entitlement to partial summary judgment as a matter of law. Plaintiff seeks partial summary judgment on the issue of the wrongful termination of the plaintiff. The submission is replete with admissions in email correspondence from Winkler concerning the financial decisions being made in an effort to keep the company afloat and the fact that the decisions being made were not personal to the plaintiff. Moreover, as noted above, pursuant to Paragraph 8.02 of the Agreement, the termination notice, for cause, must state "*the specifics of the cause of termination.*" Here, the sole reason offered for the claimed termination, that a borrower involved in a short sale cannot obtain a new FHA mortgage for a minimum of three years, is centered on a false premise, since, in fact, plaintiff was never a borrower or obligor on a promissory note. The email from Winkler to Michael Giardina, the day after the termination, reveals concern over the

above reason for the termination. The email exchange between plaintiff and Winkler on October 12, 2011 discloses Winkler's attempt to convert the sale from a private sale to a public close, to conceal the short sale. The record reveals that Winkler was well aware of the transaction that is now challenged as fraudulent. In fact, Winkler showed the home to prospective buyers and assisted with the verification of employment to help secure the purchase of the new home. Testimony before the Appeal Board clearly shows that Winkler knew and allowed the putting of another agent's name, that is, Jodi LaSalla, on the listing. The overwhelming evidence submitted on plaintiff's motion demonstrates that plaintiff was terminated for financial reasons and not the pretextual reason advanced. Financial reasons were the dominant reason for her dismissal. It is clear from the record that the November 4, 2011 termination letter violated the Agreement.

In any event, the defendants concede that they participated and profited in the subject transactions, thereby providing the plaintiff with a good faith belief that her actions were in the defendants' best interests pursuant to Paragraph 8.02 of the Agreement ("termination for cause shall not include any act or failure to act on Employee's part if done or omitted to be done by her in demonstrable good faith and with the reasonable belief that her act or omission was in the best interest of Employer ... at the time of such act or omission"). Plaintiff's actions were condoned, unchallenged, and joined in with by defendants. The email exchange of March 7, 2011 reveals the short sale, the intent to purchase a new home, and defendants' desire to share in the commissions. The defendants were aware of the sale of the one property and the purchase of the second property and shared in the profits, thereby ratifying the transactions.

The Court rejects defendants' reliance upon stale case law for the proposition that it is sufficient that a good reason for discharge actually existed at the time of discharge, although it was unknown to the employer at the time (*see e.g.* ***Hutchinson v Washburn***, 80 AD367, 80 NYS691 [2d Dept 1903]; ***Graves v Kaltenbach & Stephens, Inc.***, 205 AD 110, 199 NYS 248 [1st Dept 1923]). Such cases did not involve an express, written contract case as the instant one, where the interpretation of the wording of the Agreement is before the Court. Moreover, such after-the-fact acquired knowledge of a valid reason as justification for an earlier decision was rejected by the Court of Appeals when such was sought to justify acknowledged racial discrimination in refusing to admit a young child to a skating rink (*see* ***Proctor v Mount Vernon Arena, Inc.***, 292 NY 168 [1944], *reversing* 265 AD 701, 40 NYS2d 775 [2d Dept 1943]). The prior caselaw has given away to more established contract interpretation since that time. In any event, its limited continued application can only be found where the flagrant acts of dishonesty which seriously affect the employer's interest, continued during the employment and if the employer knew of the misconduct, it would have terminated the employment (*see* ***Bompane v Enzolabs, Inc.***, 160 Misc2d 315, 608 NYS2d 989 [Sup Ct Suffolk County 1994]; ***Rodgers v Lenox Hill Hosp.***, 239 AD2d 140, 657 NYS2d 616 [1st Dept 1997]). As detailed above, in the instant case, it is clear that defendants condoned, participated, and profited from the activities that the defendants now question.

Defendants have failed to raise a triable issue of fact.[5] Accordingly, the plaintiff's motion for partial summary judgment on the first cause of action is granted. Turning to the defendants' motion for summary judgment, the defendants' claim to entitlement to summary disposition on the first cause of action is denied, as discussed above.

Turning to the branch of the defendants' motion seeking summary judgment dismissing the second cause of action, the defendants have demonstrated, prima facie, that they are entitled to judgment as a matter of law. In support of the motion, the defendants submit the Agreement and testimonies by the parties which demonstrate that the plaintiff was an exempt executive employee who received a salary. Therefore, NY Labor Law §§§ 190, 198-c, and 198(a-1), which provide for the payment of overtime for hourly wage earners and attorney fees do not apply in this instance. In opposition, the plaintiff fails to raise a triable issue of fact. The second cause of action is hereby dismissed.

The defendants have demonstrated their prima facie entitlement to judgment as a matter of law on the third cause of action alleging unjust enrichment. It is well-settled that the existence of a written contract governing a particular subject matter precludes recovery in quasi-contract for events arising out of the same subject matter (*see* ***IDT Corp. v Morgan Stanley Dean Witter & Co.***, 12 NY3d 132, 142, 879 NYS2d 355 [2009]). The defendants contend that the parties entered into an Agreement which governs the disputes between them. In opposition, the plaintiff has failed to raise a triable issue of fact. Therefore, the third cause of action is dismissed.

The defendants have demonstrated their prima facie entitlement to judgment as a matter of law on the fourth cause of action alleging tortious interference with contract. In order to succeed on such a claim, the following four requirements must be met: a valid contract between the plaintiff and a third party must be shown to exist (***Lama Holding Co. v Smith Barney Inc.***, 88 NY2d 413, 646 NYS2d 76 [1996]); defendants must be shown to have known of the contract; defendants must be shown to have intentionally procured the breach of that contract; and damages flowing from that interference must be shown (***Mautner Glick Corp. v Edward Lee Cave, Inc.***, 157 AD2d 594, 550 NYS2d 341 [1st Dept 1990]). Here, the defendants have demonstrated that there is no third party with which it interfered. The record reveals that Winkler executed the agreement in her capacity of President of the corporate defendant and cannot be said to interfere with her own contracts. The Court agrees and notes that the plaintiff submitted no opposition to the defendants' motion. Therefore, the fourth cause of action is dismissed.

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[5] Defendants reference the criminal proceedings instituted against plaintiff as a basis for the termination for cause. The Court, as detailed above, rejects the caselaw supporting an after-the-fact justification for termination and adheres to established contract interpretation, and, in particular, "*the specifics of the cause of termination*" (*see* Paragraph 8.02 of the Agreement).

The defendants have demonstrated their prima facie entitlement to judgment as a matter of law on the fifth cause of action alleging a malicious intent by the defendants to interfere with the plaintiff's interests, which the Court construes as a prima facie tort. The theory behind the prima facie tort doctrine is that the law should provide a remedy for intentional and malicious actions that cause harm and for which there is otherwise no remedy (*see* 3-15 NY Practice Guide: Business and Commercial § 15.02 [2009]). The elements are: 1) the intentional infliction of harm, 2) resulting in special damages, 3) without excuse or justification, and 4) by an act or series of acts that otherwise would be lawful (*see* ***Burns Jackson Miller Summit & Spitzer v Lindner***, 59 NY2d 314, 464 NYS2d 712 [1983]). New York courts do not recognize liability for prima facie tort unless malevolence is a defendant's sole motive (*id.*). Motives of profit, economic self-interest, or business advantage bar recovery for prima facie tort (*see* ***Squire Records, Inc. v Vanguard Recording Soc.***, 25 AD2d 190, 268 NYS2d 251 [1st Dept 1966]). The defendants contend that the plaintiff has made no cognizable claim for relief. In opposition, the plaintiff submits her personal affidavit wherein she repeats the allegations made in the complaint, thereby failing to raise a triable issue of fact. Therefore, the fifth cause of action is dismissed.

The Court rejected the March 21, 2014 Affirmation in Further Support of Defendants' Motion for Summary Judgment as being offered three months after the submission date and is not considered as part of the record of these motions.

Accordingly, the plaintiff's motion for partial summary judgment on the first cause of action is granted; and the defendants' motion for summary dismissing the complaint is granted to the extent that the second, third, fourth, and fifth causes of action are dismissed.

Dated: 4/2/14

THOMAS F. WHELAN, J.S.C.